Supreme Court, U.S.
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No. 10-549

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In the Supreme Court of the United States

JEFFREY HOLIBAUGH,

Petitioner,

v.

ROBB EVANS & ASSOCIATES, LLC, as Receiver over the Assets of Andris Pukke and DebtWorks, Inc.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress in enacting 28 U.S.C. § 1367 overruled *Riehle v. Margolies*, 279 U.S. 218 (1929); *Pope v. Louisville, New Albany & Chicago Railway Co.*, 173 U.S. 573 (1899); *White v. Ewing*, 159 U.S. 36 (1895), which hold (or have been interpreted to hold) that a receiver appointed by a federal district court always has jurisdiction in that court to commence a civil action on claims of any nature, regardless of the absence of a statutory basis for the district court's jurisdiction over such claims?

2. Whether the Supreme Court should expressly overrule *Riehle v. Margolies*, 279 U.S. 218 (1929); *Pope v. Louisville, New Albany & Chicago Railway Co.*, 173 U.S. 573 (1899); *White v. Ewing*, 159 U.S. 36 (1895), which this Court implicitly overruled in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 552 (2005) and *Kokkonen v. Guardian Life Ins. Co of America*, 511 U.S. 375, 377 (1994)?

3. Whether *Peacock v. Thomas*, 516 U.S. 349 (1996) allows as a "proceeding" within the "ancillary enforcement jurisdiction" of a federal district court a separate civil action commenced by a receiver appointed by that court?

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OPINION BELOW

The initial opinion of the United States Court of Appeals for the Fourth Circuit is reported at 609 F.3d 359 (4th Cir. 2010). The Fourth Circuit denied a timely petition for panel rehearing and for rehearing *en banc*. Appendix 87a. The Fourth Circuit affirmed the decision of the United States District Court for the District of Maryland, which is unreported and reproduced at Appendix 20a

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Fourth Circuit's opinion was rendered on June 29, 2010. The Petition for Panel Rehearing and for Rehearing *En Banc* was denied on July 27, 2010.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article III, Section 2

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . -- to controversies . . . between citizens of different states . . . .

Title 28 United States Code, Section 1367

Supplemental Jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Title 28 United States Code, Section 1332

Diversity Jurisdiction; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

* * *

Title 28 United States Code, Section 1331

Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 28 United States Code, Section 754

Receivers of property in different districts

A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.

He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title.

Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

Title 28 United States Code, Section 959

Trustees and receivers suable; management; State laws

(a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

(b) Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

The provisions of the Act of March 3, 1891, 26 Stat. 826 ("Evarts Act"), 15 U.S.C. § 52, 15 U.S.C. § 53, 15 U.S.C. § 77v(a), 15 U.S.C. § 78aa, and the balance of 28 U.S.C. § 1332 and 28 U.S.C. § 1367 are lengthy and, therefore, set out in Appendix 88a-100a, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

1. On April 20, 2005, the United States District Court for the District of Maryland appointed Respondent Robb Evans & Associates, LLC ("REA"), as receiver over the assets of Andris Pukke ("Pukke") and DebtWorks, Inc., in a civil action commenced by the United States Federal Trade Commission ("FTC"). *Federal Trade Comm'n v. Ameridebt, et al.*, Case No PJM-03-3317 (D. Md.) (the "*FTC Action*"). Appendix 63a. The FTC brought the *FTC Action* against Pukke and entities under his control to secure relief against them pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b) (the "FTC Act"). On May 16, 2006, the District Court issued its Final Judgment and Order against Defendants in the *FTC Action*. Appendix 22a. Petitioner Jeffrey Holibaugh ("Holibaugh") was not a party to the *FTC Action*.

On September 6, 2007, REA commenced this *separate* action against Holibaugh, a citizen of Maryland, in the United States District Court for the District of Maryland to collect on an Installment Loan Note and Security Agreement ("Note") that Holibaugh had executed in favor of Infinity Resources Group, Inc. ("Infinity"), also a citizen of Maryland. REA's Complaint against Holibaugh contained three exhibits. Two of the three exhibits attached to REA's Complaint against Holibaugh established REA's authority to act as a receiver over Infinity, one of the entities under Pukke's control. Exhibit 1 to REA's Complaint was the District Court's Preliminary Injunction in the *FTC Action* whereby REA was initially appointed receiver. Appendix 63a. Exhibit 2 was a Final Order in the *FTC Action* in which the District Court restated

REA's authority to act as receiver. Appendix 22a. The third exhibit to REA's Complaint against Holibaugh was the Note itself upon which REA sought to recover from Holibaugh. The Note contains a choice of law clause stating that it is to be interpreted under the laws of the District of Columbia. *Robb Evans*, 609 F.3d at 364 n.4.

Holibaugh contests the subject-matter jurisdiction of the District Court in this action. The District Court had no subject-matter jurisdiction over this civil action because this civil action does not arise under the laws of the United States within the meaning of 28 U.S.C. § 1331, and because this civil action is between citizens of the same state within the meaning of 28 U.S.C. §§ 1332(a)(1) and (c). REA in this action alleged, and it is undisputed, that, at the time the Complaint was filed in this action, Infinity was a citizen of Maryland. REA pleaded that "at all times material hereto," Infinity "was an entity organized under the laws of the State of Maryland" and had "its principal place of business in Germantown, Maryland." It is similarly incontrovertible that, at all relevant times, Holibaugh was a citizen of Maryland. In his Answer, Holibaugh admitted that "since February 2005 he has been and continues to be a citizen and resident of Maryland." In this action, Plaintiff and Defendant are citizens of the same state.

2. REA filed its Complaint on September 6, 2007. On March 11, 2009, the District Court granted REA's motion for summary judgment on the enforcement of the Note, and denied Holibaugh's cross-motion for summary judgment on the Note. On March 26, 2009, Holibaugh moved pursuant to Rules 60(b)(4) and 12(h)(3) of the Federal Rules of

Civil Procedure to vacate the District Court's judgment on the ground that the District Court lacked subject-matter jurisdiction. On March 31, 2009, while Holibaugh's post-judgment motion was pending, the District Court entered a Final Order of Judgment against Holibaugh on the Note for $1,185,316.64. On June 12, 2009, the District Court entered an order denying Holibaugh's post-judgment motion to vacate. Appendix 20a.

3. On April 10, 2009, while his motion to vacate was pending in the District Court, Holibaugh filed an initial notice of appeal. On June 25, 2009, after the District Court had denied Holibaugh's motion to vacate, Holibaugh made timely amended notice of appeal of the District Court's initial order on the cross motions for summary judgment, its Final Order of Judgment, and its denial of Holibaugh's post-judgment motion to vacate the earlier orders due to the District Court's lack of subject-matter jurisdiction. The Fourth Circuit's decision was entered on June 29, 2010. On July 13, 2010, Holibaugh timely filed his Petition for Rehearing and for Rehearing *En Banc*. On July 27, 2010, the Fourth Circuit denied Holibaugh's Petition for Rehearing and for Rehearing *En Banc*. Appendix 87a.

REASONS FOR ALLOWANCE OF THE WRIT

The Fourth Circuit's opinion cannot be squared with the limits imposed by Article III, Section 2, of the United States Constitution, 28 U.SC. § 1367(a), or this Court's decision in *Peacock v. Thomas*, 516 U.S. 349 (1996), on the subject-matter jurisdiction of the federal district courts.

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

Kokkonen v. Guardian Life Ins. Co of America, 511 U.S. 375, 377 (1994) (citations omitted); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 552 (2005) (same).

In 1990, Congress codified the common law terms "pendent" and "ancillary" jurisdiction at 28 U.S.C. § 1367(a), establishing that the federal district courts have "supplemental jurisdiction" to hear claims otherwise outside of the district courts' original jurisdiction that are nevertheless "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a); *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 165 (1997). Several Circuit Courts of Appeal have recognized that the statutory "case or controversy" language in 28 U.S.C. § 1367(a) extends to the limits of Article III. *See, e.g., Voda v. Cordis Corp.*, 476 F.3d 887, 894 (Fed. Cir. 2007); *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 212 n.5 (2d Cir. 2004); *Baer v. First Options of Chicago, Inc.*, 72 F.3d 1294, 1299 (7th Cir. 1995).

This Court has recognized that the supplemental jurisdiction of the district courts has

two aspects. First, and as now established by 28 U.S.C. § 1367, supplemental jurisdiction exists "to permit disposition by a single court of claims that are, in varying respects or degrees, factually interdependent." *Kokkonen*, 511 U.S. at 379-80. Second, the federal district courts retain jurisdiction to "enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.*, at 380. In *Peacock*, this Court further defined the limits of the second aspect of supplemental jurisdiction, denominated "ancillary enforcement jurisdiction," which extends to "a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments – including attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances." *Peacock v. Thomas*, 516 U.S. 349, 356 (1996). But in *Peacock*, this Court was careful not to let "ancillary enforcement jurisdiction" swallow the need for a statutory basis for the exercise of subject-matter jurisdiction:

> Our recognition of these supplementary *proceedings* has not, however, extended beyond attempts to execute, or to guarantee eventual executability of, a federal judgment. *We have never authorized the exercise of ancillary jurisdiction in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment.*

Id. at 357 (emphases added). Yet, as explained by Circuit Judge Gregory in his dissent, Appendix 13a-18a, the Fourth Circuit's decision allows precisely

what *Peacock* forbids: REA commenced its civil action against Holibaugh *after* a final judgment had been entered in the *FTC Action* – an action in which Holibaugh was not a party – to impose liability on Holibaugh.

Moreover, this action goes well beyond what *Peacock* envisioned as impermissible. *Peacock* forbids the use of "ancillary enforcement jurisdiction" to impose an *existing* federal judgment on one not already liable for that judgment. Here, however, the Fourth Circuit has allowed REA to create in the federal district court -- without any independent basis for jurisdiction there -- a *new* federal judgment against Holibaugh on a theory of liability arising not under the FTC Act, but under the laws of the District of Columbia, wholly separate from any judgment created in the *FTC Action*. To make this case fit within *Peacock*, the Fourth Circuit -- without analysis -- characterized REA's action against Holibaugh as a "*separate proceeding*" allowed by *Peacock*, not as a separate "claim" in need of an independent basis for jurisdiction under 28 U.S.C. § 1332 or § 1367(a). *Robb Evans*, 609 F.3d at 363 n. 2. If the Fourth Circuit's stretching of the limits of *Peacock* is allowed to stand, there will be continued confusion, especially in federal receivership actions, over what constitutes a "proceeding" that falls within the narrow "ancillary enforcement jurisdiction" delimited by *Peacock*, and what constitutes a "claim" that must have an independent statutory basis for the original jurisdiction of the federal district courts.

The Fourth Circuit's decision concedes the absence of a statutory basis for the District Court's original jurisdiction. The Fourth Circuit's stretching

of *Peacock* arises out of its attempt to square *Peacock* with decisions of this Court in a series of cases predating 28 U.S.C. § 1367, all of which hold (or have been interpreted to hold) that a receiver appointed by a federal district court always has jurisdiction in that court to commence a suit on claims of any nature, regardless of the absence of a statutory basis for the district court's jurisdiction over such claims. *Riehle v. Margolies*, 279 U.S. 218 (1929); *Pope v. Louisville, New Albany & Chicago Railway Co.*, 173 U.S. 573 (1899); *White v. Ewing*, 159 U.S. 36 (1895). Most of the more recent Circuit Court decisions in support of this precedent have invoked *Pope* for the proposition that there is always jurisdiction in the court of his appointment for an action brought by a federal receiver. *See, e.g., Donnell v. Kowell,* 533 F.3d 762, 769 (9th Cir. 2008)[1]; *Haile v. Henderson Nat'l Bank*, 657 F.2d 816 (6th Cir. 1981).

The Fourth Circuit recognized that it has no authority to overrule *Pope*, *Riehle*, or *White*. *Robb Evans*, 609 F.3d at 364 n.3 (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.")). To the extent that they continue to serve as a basis for the subject-matter jurisdiction in the federal district courts, the *Pope* line of cases -- *Pope, Riehle, and White* -- will

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[1] *Donnell*, the only Circuit Court decision to invoke *Pope* since the passage of 28 U.S.C. § 1367, is distinguishable because, in that case, there was an independent, statutory basis for subject-matter jurisdiction in 15 U.S.C. *§§ 77v(a), 78aa.* See discussion, *supra.*

continue to undermine *Allapattah*, *Kokkonen*, *College of Surgeons*, and now, because of the Fourth Circuit's decision below, *Peacock*. The *Pope* line of cases should be expressly overruled.

Congress alone holds the power to create an omnibus subject-matter jurisdiction for receivership actions. The statutory bases for the subject-matter jurisdiction of the lower federal courts may not be ignored.

> Congress has the constitutional authority to define the jurisdiction of the lower federal courts, see *Finley v. United States*, 490 U.S. 545 . . . and once the lines are drawn, "limits upon federal jurisdiction . . . must neither be disregarded nor evaded," *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

Keene Corp. v. United States, 508 U.S. 200, 207 (1993) (citations truncated). Holibaugh respectfully submits that the Fourth Circuit's decision evades the jurisdictional lines established by 28 U.S.C. § 1367 and the narrow zone of "ancillary enforcement jurisdiction" described in *Peacock*.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE CONTINUED APPLICABILITY OF THE *POPE* LINE OF CASES WHENEVER A FEDERAL DISTRICT COURT APPOINTS A RECEIVER.

This civil action does not "arise under" the laws of the United States within the meaning of 28

U.S.C. § 1331. The well-pleaded-complaint rule governs whether a case "arises under" federal law for purposes of Section 1331. *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125, 127-28 (1974) (*per curiam*). To arise under federal law, REA's Complaint must establish that Infinity's right to relief necessarily depends on resolution of a substantial question of federal law. *Id.* REA's Complaint does not, however, depend on the resolution of any question of federal law, substantial or not. Far to the contrary, this action arises under the laws of the District of Columbia. Nor is it availing here that REA proceeded in this action to give effect to the receivership established in the *FTC Action*. *Thompson v. Standard Oil Co. of N.J.*, 67 F.2d 644, 647 (4th Cir. 1933) (reciting that "it has been held that the fact that a judgment was recovered in a federal court does not, in a suit upon the judgment, raise a question under the laws of the United States") (citing *Provident Savings Society v. Ford*, 114 U.S. 635, 641 (1885)), *cert. denied*, 292 U.S. 631 (1934).

There is no diversity jurisdiction in the District Court because Infinity and Holibaugh are citizens of Maryland. The diversity jurisdiction of the federal district courts depends on the citizenship of the real parties to the controversy, even where the nominal party bringing the action is authorized to do so pursuant to Rule 17(a) of the Federal Rules of Civil Procedure. *Navarro Savings Ass'n v. Lee*, 466 U.S. 458, 461 (1980). It is similarly axiomatic that a receiver acquires "no greater rights and powers to sue than the person or entity whose property is in receivership." *Liberte Capital Group, LLC v. Capwill*, 248 Fed. Appx. 650, 657 (6th Cir. 2007); *Javitch v. First Union Sec., Inc.*, 315 F.3d 619 (6th

Cir. 2003) ("Because they stand in the shoes of the entity in receivership, receivers have been found to lack standing to bring suit unless the receivership entity could have brought the same action."). Since 1935 it has been well settled that "the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have." *McCandless v. Furlaud*, 296 U.S. 140, 148 (1935). In *McCandless*, Justice Cardozo "clearly emphasized that the receiver in that case was suing on behalf of the corporation, not third parties . . . " *Id.* In other words, the receiver can only make a claim which the corporation could have made. *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 429 (1972) (citing *McCandless*, 296 U.S. 140).

Nor does 28 U.S.C. § 1367 provide "supplemental" jurisdiction here. That statute allows jurisdiction to extend only in narrow circumstances in a civil action in which there is otherwise a basis for jurisdiction: Here, there is no basis whatsoever. *See, e.g., Exxon Mobil*, 545 U.S. at 554 (holding that "[i]n order for a federal court to invoke supplemental jurisdiction . . . it must first have original jurisdiction over at least one claim in the action."); *Picciotto v. Continental Cas. Co.*, 512 F.3d 9, 21 (1st Cir. 2008) ("The plain language of [28 U.S.C. § 1367] incorporates this well established requirement that there be a viable action over which the district court has 'original jurisdiction' before supplemental jurisdiction may be considered").

Nor does 28 U.S.C. § 754 confer jurisdiction upon the District Court. "The fact that a federal receiver has the capacity to sue . . . and files an action in federal court does not, however, confer subject-matter jurisdiction upon that court." *U.S. v.*

Franklin Nat'l Bank, 512 F.2d 245 (2d Cir. 1975)). Hence, the appointment of REA as receiver in the *FTC Action* does not confer subject-matter jurisdiction in this action.

The essential basis for the Fourth Circuit's finding jurisdiction in this action is *Pope v. Louisville, New Albany & Chicago Railway Co.*, 173 U.S. 573 (1899). The federal district court for the Central District of California correctly summed up *Pope* as follows:

> Plaintiff-receiver had filed an action in federal court against defendant railroad to enforce the claims of his estate to certain property. State law claims were asserted, and the plaintiff had obtained leave of the court of his appointment to file the claims. After a money decree in [receiver's] favor, the Court of Appeals for the Seventh Circuit ultimately reversed the lower court and ordered the cause dismissed. The [receiver] appealed to the Supreme Court, arguing that the jurisdiction of [the receiver's] cause of action was founded not only on diversity of citizenship (in which case the determination of the Court of Appeals was final) [under the Evarts Act], but also because of the ancillary nature of the suit (in which case the Supreme Court could hear the appeal). The Court dismissed the appeal, holding that the jurisdiction of the ancillary matter was entirely dependent upon the jurisdiction in the suit in which the receiver was

appointed, and that since jurisdiction of the main action was based on diversity, jurisdiction of the receiver's ancillary matter must also be based on diversity. The Court refuted the suggestion that the fact of appointment was enough to confer federal jurisdiction on all claims brought by a receiver:

> "We cannot accept the suggestion that the mere order of a federal court, sitting in chancery, appointing a receiver on a creditor's bill, not only enables the receiver to invoke Federal jurisdiction, but to do this independently of the ground of jurisdiction of the suit in which the order was entered."

173 U.S. at 578-79, 19 S. Ct. at 502. Nothing in *Pope* suggests that the appointment of a receiver by a federal court mandates that suits brought by the receiver alleging non-federal claims be heard in the court of appointment.

Canut v. Lyons, 450 F. Supp. 26, 31 (C.D. Cal. 1977).[2]

The Ninth Circuit in *Donnell v. Kowell*, 533 F.3d 762 (9th Cir. 2003) does not depend on *Pope* (although *Pope* is cited therein). As stated by the Ninth Circuit in *Donnell*:

> The federal securities laws create exclusive federal jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created by" federal securities laws. *15 U.S.C. §§ 77v(a), 78aa.* The federal district court properly authorized the Receiver to bring suits under state law in federal court under ancillary jurisdiction for the purpose of effectuating its decree of liability against Wallenbrock because the primary lawsuit against Wallenbrock presented a federal question. *See 28 U.S.C. § 1367; Fed. R. Civ. P. 66.*

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[2] The analytical framework for *Pope* is Section 6 of the Act of March 3, 1891, 26 Stat. 826 ("Evarts Act"), the Act that created the initial circuit courts of appeal, and which this Court interpreted in *Pope* to mean that a receiver appointed in an action arising under federal law is not authorized to bring an action alleging state law claims, and *vice versa*. Whenever Pope was invoked to establish jurisdiction of a receiver's state-law action outside of a question raised by the application of the Evarts Act, *Pope* was misused. Even if it is assumed that the *Pope* framework survives the subsequent enactment of 28 U.S.C. §§ 1331, 1332, and 1367, *Pope* is useless to REA here. REA was appointed in the *FTC Action*, which raises a question under federal law; in this action, however, REA seeks to enforce a state-law claim. That is precisely what *Pope* forbade, albeit long ago and under a statutory scheme that has no application here.

Donnell, 533 F.2d at 769. REA's action against Holibaugh does not raise a question invoking the federal securities laws or Congress's broad authorization of original jurisdiction in the federal district courts for "all suits in equity actions at law brought to enforce any liability or duty created by" such laws. *Donnell* is consonant with 28 U.S.C. § 1367(a), which provides the sole basis for supplemental jurisdiction "except as expressly provided otherwise by Federal statute."

Congress has not authorized the same broad original jurisdiction in support of the FTC Act. By 15 U.S.C. § 53(b), Congress authorized the FTC to bring action in the federal district courts against any person or entity that the FTC has reason to believe is violating Section 12 of the FTC Act, 15 U.S.C. § 52, by disseminating false advertising in interstate commerce. The FTC did not seek to plead Holibaugh into the *FTC Action*, as there is not now -- and there never has been -- any basis to allege that Holibaugh had violated (or had participated with Pukke in violating) the FTC Act. But neither, however, did REA seek to plead Holibaugh into the *FTC Action* once the District Court had authorized REA to act as receiver for Pukke's assets. The FTC Act ostensibly authorizes the federal district courts to exercise such jurisdiction:

> In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation [besides one violating 15 U.S.C. § 52] should be a party in such suit [commenced pursuant to 15 U.S.C. § 53], cause such other person, partnership, or

> corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought.

15 U.S.C. § 53(a). The District Court in the *FTC Action* arguably had discretion to exercise supplemental jurisdiction in that action over REA's dispute with Holibaugh on the Note. 28 U.S.C. §§ 1367(a) and (c). Yet REA never asked the District Court in the *FTC Action* to allow REA -- pursuant either to 15 U.S.C. § 53(a) or to 28 U.S.C. §§1367(a) and (c) -- to proceed in the *FTC Action* in the name of Infinity against Holibaugh on the Note.

Instead, REA commenced this separate action against Holibaugh, for which there is no statutory basis for jurisdiction in the federal district court.

II. REVIEW IS WARRANTED TO RESOLVE A CONFLICT BETWEEN THE FOURTH CIRCUIT'S OPINION IN THIS ACTION AND THIS COURT'S DECISION IN *PEACOCK v. THOMAS*.

The Fourth Circuit's decision does not address its conflict with *Peacock*. Instead, the Panel borrows a word from *Peacock* – "proceedings" – to characterize the lawsuit that REA commenced against Holibaugh without any statutory basis for jurisdiction. This Court has made it clear that the supplemental jurisdiction of the federal district courts may be invoked only in the presence of an independent basis for the exercise of original jurisdiction. There is no independent basis for jurisdiction here.

And there is no compelling reason under *Peacock* to extend "proceedings" to this civil action, which REA brought as an independent civil action against Holibaugh after final judgment had been entered in the action in which REA was appointed receiver. This action does not involve any of the "proceedings" permitted by *Peacock* as an exercise of a district court's "ancillary enforcement jurisdiction."

There is nothing in the Fourth Circuit's opinion that explains how, if at all, REA's action against Holibaugh in this separate action somehow vindicates the District Court's authority in the *FTC Action*. Without that basis, the Fourth Circuit's decision must stretch Peacock to allow what Congress has forbidden at 28 U.S.C. §§ 1331, 1332, and 1367(a).

CONCLUSION

For all of the foregoing reasons, Holibaugh respectfully requests that the Supreme Court grant review of this matter.

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Respectfully Submitted ,

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